National Propane Partners, L.P. *and* Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 525, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Case 14–CA–25471

August 1, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On September 30, 1999, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief. The Respondent filed a brief in response to the cross-exceptions. The General Counsel and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

1. The judge found that discriminatee Beckham attempted to suborn perjury by asking Jack Stice to falsely state in a Board affidavit that Beckham had never brought a gun onto the Respondent's property. The judge therefore indicated that Beckham's backpay could be tolled as of the date of the attempted subornation (leaving the precise date to be determined in the compliance proceeding). In agreement with the General Counsel's cross-exceptions, we find that the evidence is too ambiguous to establish Beckham's intent to induce Stice to lie, rather than truthfully to deny that Beckham had threatened Stice with a gun. For this reason, we find that Beckham is entitled to full reinstatement and backpay.

We do not agree with our dissenting colleague that Beckham has admitted in this case that he intended to request Stice to lie when he asked Stice to tell a Board agent that Beckham "never" brought a firearm onto the Company's premises. Although Beckham had occasionally brought a gun in the locked trunk of his car into the Respondent's parking lot, Beckham specifically denied asking Stice to lie, indicated that he viewed the Company's premises as limited to its building, and wanted Stice to rebut only the specific allegations of the Respondent's recent legal complaint allegation against him; i.e., that on a specific day, Beckham had brought a loaded gun onto Respondent's premises and threatened Stice or Branch Manager Denise Yates with it. This allegation was, in fact, untrue. Considering the entirety of Beckham's testimony, we find the evidence insufficient to show that Beckham knew that the testimony he sought from Stice would be a lie.

2. In adopting the judge's recommendation of a remedial bargaining order, we note that the sole basis for the Respondent's exception to this remedy is its underlying claim that the discharge of employee Michael Beckham did not violate Section 8(a)(3) of the Act. The Respondent makes no claim in its exceptions or brief that if the Board affirms the judge's finding of an unlawful discharge of Beckham—which we do—a bargaining order is not an appropriate remedy, and it offers no mitigating evidence with respect to the judge's analysis under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Although the Board has discretion to reach remedial issues not raised by the parties,[5] under all of the circumstances presented, including the reasons articulated by the judge and the absence of argument from the Respondent, we agree that the *Gissel* bargaining order is appropriate.[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, National Propane Partners, L.P., Moro, Illinois, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(e) of the judge's recommended Order.

"(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] There are no exceptions to the judge's conclusion that the Respondent violated Sec. 8(a)(1) of the Act when its manager threatened employee Michael Beckham with discharge and plant closure.

[4] We shall modify the judge's recommended Order in accordance with *Ferguson Electric Co.*, 335 NLRB 142 (2001) and substitute a new notice in accordance with *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001).

[5] *Miramar Sheraton Hotel*, 336 NLRB No. 123 (2001).

[6] Member Bartlett would find that a *Gissel* bargaining order is unwarranted under the particular circumstances of this case and that traditional remedies would suffice to erase the effects of the Respondent's unfair labor practices.

good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN HURTGEN, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) of the Act by threatening employee Michael Beckham with discharge and threatening plant closure, and Section 8(a)(3) and (1) of the Act by discharging Beckham for his union activity. I also agree with Member Liebman that a *Gissel*[1] bargaining order is warranted under the specific circumstances in this case. Finally, although I agree with my colleagues that Beckham is entitled to reinstatement, I disagree that he is entitled to full backpay. I agree with the judge that Beckham attempted to suborn perjury by asking employee Jack Stice to falsely state, in a Board affidavit, that Beckham had never brought a gun onto the Respondent's property. Thus, like the judge, I would toll Beckham's backpay as of the time he attempted to suborn perjury (leaving the precise date to be determined in a compliance proceeding).

The facts are these. On March 2, 1999,[2] the Respondent filed a complaint and a motion for a temporary restraining order (T.R.O.) against Beckham in the circuit court of Madison County, Illinois. The complaint stated that Beckham entered the Respondent's premises "with a loaded firearm on January 28, 1999," and that Stice and Branch Manager Denise Yates "were assaulted or threatened" by the armed Beckham.[3]

On March 9, Beckham gave an affidavit to the Board. Beckham testified in the Board proceeding as to this affidavit. Beckham testified that he asked Stice to give a Board agent a statement confirming that Beckham "never brought a firearm on the company's premises."

Beckham also testified that, on occasions, he did have a gun locked in the trunk of his car parked on the Respondent's lot in front of the Respondent's facility. Beckham initially testified that this was not indicative of his bringing a gun onto the Respondent's premises. However, subsequently, Beckham testified that since the Respondent owned the parking lot, Beckham had brought a gun onto the Company's premises. Indeed, Beckham finally admitted that his request to Stice to tell the Board agent that Beckham never brought a firearm onto the Company's premises was a request that Stice tell a lie.

The judge cited Beckham's testimony about Beckham's request of Stice, and found that Beckham attempted to suborn perjury "in that he attempted to have Stice make a false statement in an affidavit that he (Stice) was going to give the Board." The judge thereby relied on Beckham's admission that he requested Stice to tell a lie.

My colleagues disagree with the judge and find that "the evidence is too ambiguous to establish Beckham's intent to induce Stice to lie, rather than truthfully to deny that Beckham had threatened Stice with a gun." I disagree. As noted, the complaint seeking the T.R.O. stated that (1) Beckham entered the Respondent's property with a loaded gun on January 28; and (2) Beckham threatened Stice and Yates with his gun. My colleagues say that Beckham asked Stice to deny 2 above, i.e., to truthfully say that he was not threatened. It may well be that Beckham asked Stice to deny 2 above. Be that as it may, however, it does not contradict the fact that Beckham also asked Stice to deny 1 above. As noted above, the judge found that Beckham asked Stice to testify in response to 1 above, i.e., to say that Beckham never brought a gun onto the Respondent's property. As also noted above, Beckham knew that such testimony by Stice would be a lie.

Based on the above, Beckham suborned perjury and is not entitled to full backpay.[4]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

[1] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[2] All dates are in 1999 unless otherwise indicated.

[3] The court granted the temporary restraining order on March 2.

[4] I agree with the judge that Beckham is entitled to reinstatement because he did not threaten Stice when he asked Stice to lie to the Board agent. Compare, *Lear-Siegler Management Service*, 306 NLRB 393 (1993). I also agree with the judge that Beckham's backpay must be tolled at the time he asked Stice to lie to the Board agent (the exact date to be established in compliance). *Lear-Siegler Management Service*, supra.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discharge if you select the Teamsters, Local Union No. 525 as your bargaining representative.

WE WILL NOT advise you that other employees who supported a union in the past were discharged.

WE WILL NOT threaten you with plant closure if you select the Union as your bargaining representative.

WE WILL NOT threaten you with discharge if the union organizing efforts are successful.

WE WILL NOT discharge any employee because the employee formed, joined, and assisted the Union and engaged in concerted activities, and WE WILL NOT discharge any employee to discourage you from engaging in these activities.

WE WILL NOT in any manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer Michael Beckham full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Beckham whole for any loss of earnings and other benefits suffered as a result of his discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge, and WE WILL within 3 days thereafter notify Michael Beckham in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, on request, recognize and bargain with the Teamsters, Local Union No. 525 and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All route sales representatives employed by us at our Moro, Illinois facility, EXCLUDING office clerical and professional employees, guards and supervisors as defined in the Act.

NATIONAL PROPANE PARTNERS, L.P.

Mary J. Tobey, Esq., for the General Counsel.

William F. Dugan, Esq. and *John W. Powers, Esq. (Seyfarth, Shaw, Fairweather & Geraldson)*, of Chicago, Illinois, for the Respondent.

Thomas A. Pelot, of Alton, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. A charge was filed on March 3, 1999 by Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 525, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Union)[1]. On April 27, a complaint was issued which alleges that National Propane Partners, L.P. (Respondent) (a) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by threatening employees with discharge and with plant closure if they selected the Union as their bargaining representative, by advising employees that other employees who supported a union in the past were discharged and by advising an employee that employees should bring problems to Respondent instead of seeking union representation, and (b) violated Section 8(a)(1) and (3) of the Act by discharging Michael Beckham on February 18.[2] Respondent denies violating the Act as alleged.

A hearing was held on June 22 in St. Louis, Missouri. On the record, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel and Respondent on July 28 and 29, respectively, I make the following

FINDINGS OF FACT

Jurisdiction

Respondent, a Delaware corporation, with an office and place of business in Moro, Illinois, is engaged in the sale and distribution of propane and related products. The complaint alleges, the Respondent admits, and I find that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Facts

Joint Exhibit 1 is Respondent's employee handbook which was in effect at all times material in this case. As here pertinent, pages 208 and 209 read as follows:

The following rules apply to employees while on company property.

1. Theft, vandalism, or careless destruction of company property or property belonging to a fellow employee will not be tolerated and will be a cause for immediate termination.

2. Drinking, using, possessing, and selling intoxicants or narcotics, are prohibited.

3. Use or possession of firearms/weapons is prohibited.

4. Making fraudulent statements on employment applications or job records is prohibited.

[1] Unless indicated otherwise, all dates are in 1999.

[2] On brief counsel for the General Counsel moves to withdraw complaint allegation 5Di. Respondent, on brief, points out that the General Counsel failed to present any evidence as to this allegation and requests that it be dismissed in its entirety. The General Counsel's above-described motion is granted.

5. Performing work or activities of a personal nature on company time is prohibited.

. . . .

10. Excessive absenteeism is grounds for dismissal.

. . . .

A violation of any of the above is grounds for disciplinary action up to and including termination.

Michael Beckham was hired by Respondent to work as a driver and sales representative at its Moro facility in January 1998.[3] At the time two other people worked at Respondent's Moro facility, namely, Denise Yates, who is the branch manager, and Jack Stice, who is a driver and sales representative who services residential customers with a bobtail truck apparently towing a tank trailer. Beckham delivered propane cylinders to commercial customers, collected on accounts, maintained the cylinders in working order, and solicited new business. At first he drove a large 1-ton stake-bed truck which held up to 80 cylinders. Yates testified that she did not believe that the truck Beckham drove when he was hired held up to 80 cylinders; [4] and that Stice, who was hired 2 years before Beckham, complained that Beckham started out at a higher wage rate than Stice did and that this angered Stice.

In May 1998 Beckham received a $.30 an hour raise.

Beckham testified that he complained to Yates about the backstabbing by Stice regarding how Beckham handled his route; that he asked her how bad was she going to let it get before she did something about it; and that he told Yates that he and Stice were going to end up fighting and he asked her rhetorically if he was going to have to "kick . . . [Stice's] ass."

Stice testified that in the summer of 1998 he kept seeing Beckham's vehicle parked where his girlfriend worked 1 to 1-1/2 hours a day and he complained to Yates about Beckham; that subsequently Beckham told him that he should mind his own business or he would "[b]eat my f'ing head in"; and that this occurred before Beckham met with the representatives of Local Union 525.

In June or July 1998, according to the testimony of Beckham, Donald Brinkman, who is the district manager for Hazelwood and the area manager for four other plants including the Moro plant, came to the Morro facility to try to resolve the personality problems. Beckham testified that Stice complained that Beckham was hired in at more money than him and he only received a $.27 raise in May while Beckham received a $.30 raise; that Stice also complained that Yates was "no kind of a manager" and she was unprofessional and Beckham agreed; and that he complained that he was sick and tired of Stice second guessing him regarding how he was handling his route. Beckham also testified that after Brinkman listened to the complaints he told him, Yates, and Stice that there were only three of them at the facility and the Company could replace any of them or all of them; and that Brinkman also said that if they all wanted to keep their jobs, they were going to have to work together to make the place go. Beckham further testified that Stice later apologized to him; and that he and Stice then got along well together. Stice testified that he and Beckham agreed to put their problems behind them.

In August 1998, Beckham received a raise from $9.30 to $11.70 an hour when he resigned from Respondent to accept a higher paying job and Respondent gave him the raise to retain him.

In early August 1998, Beckham contacted the Teamsters Union. Beckham testified that at the behest of Stice he contacted Respondent's employee John Schulte at Respondent's Hazelwood facility to get information about the Union; that he then telephoned Teamsters Local 610 and was told that he should contact Teamsters Local 525 in Alton; and that he spoke with Tom Pelot at Local 525 and set up a meeting for August 3, 1998. Stice testified that the idea to meet with the Union was "[a] little bit of both" he and Beckham; and that he did not have a conversation with Schulte about unionization.

On August 13, 1998, Beckham and Stice met with Pelot, who gave them union authorization cards.[5] Beckham testified that he read the card that evening and he then signed the card, General Counsel's Exhibit 3.

On August 14, 1998, Beckham saw Stice fill out his union authorization card and sign it, General Counsel's Exhibit 4. Stice asked Beckham to mail his card with Beckham's card to Teamsters Local 525.

Several weeks later Beckham telephoned Pelot who indicated that he had not forgotten but he was very busy.

Yates testified that on October 13, 1998, Beckham stormed into the office and told her that "if Stice did not get out of his face, he was going to beat his fucking head in"; that the week before this, on October 7, 1998, Beckham called in sick and on October 9, Friday, when she telephoned Beckham to find out if he was coming in to work Beckham told her he would be in; that he did not come in on October 9, 1998, and about 1 p.m. that day Beckham called her and apologized, indicating that he and his girlfriend got married; and that she reported what Beckham said about Stice to Brinkman. On cross-examination Yates testified that Brinkman came to Moro in October after she telephoned him and they all had a discussion; and that

[3] Respondent also has facilities at Hazelwood and Washington, Missouri. Local 610 of the Teamsters represents the employees at both of these facilities.

[4] Yates was not subsequently asked to give her opinion as to how many cylinders the truck did hold.

[5] The card reads as follows:

AUTHORIZATION TO TEAMSTERS LOCAL 525

Date……..
I the undersigned employee of
…….authorize
Name of Company
Teamsters Local 535 to represent me in collective bargaining
(Please print) ……..
Signature of Employee
…….. ……..
Name of Employee Phone
…….. ……..
Home Address …….. ……..
City State
…….. ……..
Classs of Work Shift Badge No.

This card is for use in support of the demand of Teamsters Local Union 525 for recognition or for an N.L.R.B. Election.

Brinkman told them all to get along. Subsequently Yates testified that Stice's girlfriend saw Beckham at the gas station all dressed up with his girlfriend on October 9, about 1 hour after Beckham said that he would be in, and Stice's girlfriend telephoned him at work; and that Stice then told Yates about the sighting and Yates told Beckham that is how she knew of his whereabouts.

According to the testimony of Stice, approximately 2 months before Beckham's termination, which would place it about December 18, Beckham told him that he wanted to get Yates fired and he wanted to allege sexual harassment on the part of Yates. More specifically, Stice testified that Beckham wanted to indicate that Yates fondled one of them and the other would verify this; and that he told Beckham "no." On cross-examination Stice testified that he did not tell Yates about this scheme at this time because he thought it was a joke. On rebuttal Beckham testified that he never asked Stice to collaborate on any sort of sexual harassment charge against Yates and he did not ever ask him to sign a statement that she had grabbed anyone's privates.

On cross-examination Beckham testified that after the New Year's holiday he told Yates that he was not going to do any more service work that he had not been trained to do; that Yates said "I'll tell you to do it and you will go do it"; that he explained to Yates that he was not going to because there was too much liability involved; that the issue arose when Yates sent him out to look at a job and he told her that the customer wanted to drill an 8 inch hole in the foundation to run the flue through; and that the working relationship with Yates was not so good after the first of the year.

Beckham testified that he waited until after the holidays to telephone Pelot again; that when he telephoned in January Pelot was out of town; that he left the telephone number of Respondent's Moro facility for Pelot to call him with instructions that he should telephone the number in the early morning before Beckham went out on his route; that a few days after he telephoned the Teamsters hall to speak to Pelot, Yates called him on his company-wide radio while he was out on his route and told him that he had a call from a fellow from the Teamsters Union and she did not know if it was important and maybe he should return the call; and that later at the shop when he asked Yates how she knew that caller was from the Union, Yates told him that although the caller did not identify himself she dialed *69 after he hung up and the person answering the telephone answered "Teamsters." Yates testified that she used *69 and the woman answering the telephone said "Teamsters"; and that she probably told Beckham on the radio that someone from the Teamsters telephoned him.

About 1 week later, according to the testimony of Beckham, Yates was handing out daily tickets to him and Stice in the drivers' room and she said, while focusing on him, "I guess you know that anybody who has ever tried to get the union in here, ended up being fired for one reason or another." Beckham testified that he replied that he had not done anything to get him fired and he had a perfect work record; that he told Yates "you've never written me up . . . , I've gotten no reprimands in my file . . ."; and that Yates said "well, there is [sic] some offenses that you don't have to be written up for." Stice testified that Yates did not, in his presence in the drivers room, tell him and Beckham or Beckham that other employees had tried to get the union in and had been fired. Yates testified that she had been at the Moro facility since 1992 and there has never been any other attempt to organize that facility that she was aware of; that she never told Beckham or anyone else that other people who had pushed for or supported the union had been fired; that she was not aware of anyone else that had ever sought to organize that facility or any of Respondent's other facilities; and that she is aware that Respondent's Peoria, Illinois and Hazelwood facilities have union contracts.

On January 28 the Union filed a petition in Case 14–RC–12018 to represent the drivers and sales representatives at Respondent's Moro facility. The parties stipulated that the petition was faxed to Respondent's Moro facility on January 28.

Subsequently, according to the testimony of Beckham, Yates told him "the company can't afford to hire a service man. We didn't make enough money last year. The company will probably close this plant. We can' pay union wages." Beckham also testified that Yates "continued with her statements about . . . You'll probably lose your job if you guys go through with the union thing. We can't afford to pay the union wages. The company will probably close this plant"; and that Stice was present on at least two occasions when Yates made these statements. On cross-examination Beckham testified that in February before he was terminated Yates said that he would probably lose his job if he went ahead with the union. Stice testified that Yates did not, in his presence in the drivers room, tell him and Beckham or Beckham that the Company would close the plant if the Union came in or that they would probably lose their jobs if they went ahead with the Union. Yates testified that she never had a conversation with Beckham or in Beckham's presence that the company would probably close the plant because it could not afford union wages; and that she never told Beckham or Stice that they would probably lose their job if they went ahead with the union.

Stice testified that "in. .. . February, something like that" Beckham displayed a gun to him at the workplace; that he did not remember the exact date; that Beckham "just pointed a gun at me and he said, what do you think of this. I said, yeah, it's a gun. He said, yeah, I carry this for protection when I do my East St. Louis route. And that was basically it"; that when this occurred he was motor fueling his truck at the plant; that he thought that in describing the East St. Louis route Beckham used the word "niggers"; that the weapon was a little silver gun with a white handle and it was either a 22 or a 25 caliber but he was not sure; that Beckham had the gun in a little black holster that clipped on the back of his pant belt loop in the back; that he waited 24 hours and then he told Yates about the gun incident, indicating that if she did not do something about it he was going to have to look for other employment; and that he thought that he told Yates about the gun incident the day Brinkman came to the plant, February 2, or the day after. Subsequently Stice testified that he did not report the alleged gun incident to the police either at that time or later. On rebuttal Beckham testified that he does not own a holster.

Beckham testified that he never brought a weapon on his East St. Louis route; that he never told anyone at work that he

brought a weapon on his East St. Louis route; that he never threatened anyone with a gun at work; that he never pointed a gun at anyone at work; that he never brought a loaded gun to work; that he did bring an unloaded, cased, small-caliber, semi-automatic handgun in the trunk of his car to the Moro facility in September 1998, when Stice expressed an interest in purchasing a handgun; that Stice looked at the handgun while it was in the trunk of the car and the weapon was not removed from the trunk while on company property; that at the time Beckham's car was parked on company property where retail customers normally park; and that he did not point the gun at Stice and the gun was not removed from the case. On redirect Beckham testified that Stice asked him if he could bring the handgun where Stice could see it. When asked the following question "Mr. Beckham has testified that in September 1998, that he brought a gun to work in order to show it to you for the purposes of selling a 25 caliber pistol to you. Did that event ever occur?" Stice answered "I don't remember that, no." Stice testified that he has owned a 12 gauge shotgun and a 22 semi-automatic pistol probably for 10 to 15 years; that he has not purchased a handgun since September 1998; and that he has never had a discussion with Beckham about purchasing a handgun from him or anyone else from September 1998 to the present. On rebuttal Beckham testified that the gun he showed Stice is small, very compact, and would fit in the palm of the hand. Subsequently Beckham testified that he would not want to carry a 25 in his waistband.

On February 2, as stipulated by the parties, Brinkman was in Moro. Brinkman works out of Hazelwood. Beckham testified that Brinkman came to Respondent's Morro facility on February 2; that Brinkman met with him, Yates and Stice, in the drivers' room indicating that Respondent had not turned a big profit in the forth quarter and that there were three entities looking at purchasing Respondent, including two competitors and a utility type company; that Brinkman, in answering a question of Beckham indicated that he did not know the identity of the potential purchasers; that Stice asked if the Moro facility might be closed and Brinkman indicated that it was a possibility; that when Stice then asked if they all should go out an look for jobs Brinkman said that they should not jump to any conclusions, just stay put and he would keep them informed; that Stice was then dismissed by Brinkman and told to go on his route; that Yates then told him that he had to stay behind because she wanted to discuss his performance with Brinkman; that Yates said that his performance was down from 6 months ago; that he explained that the big stake-bed truck he had been driving had broken down in November 1998, and since then he had been working out of the back of a little pickup truck and he could not transport the number of cylinders he needed;[6] that he explained to Brinkman that he needed a bigger truck or a trailer; that he complained to Brinkman about Yates performing specified personal matters on comp time and Brinkman said that Respondent does not have comp time; that he mentioned that Yates' husband left the facility with a tank trailer on the back of his personal truck and Brinkman said that he was not there to witness it, there were a lot of personal problems at the Moro facility and they were all going to have to make the Moro facility work; that he went to load his truck and Brinkman approached him and said "I wish you guys would have got a hold of me sooner and let me know about these problems over here before you went to the union with it"; and that he replied to Brinkman that he guessed that it was too late for that now and Brinkman shook his head to signify yes. Stice testified that Brinkman told them that they were not going to lose their jobs and they should hang in there and ride it out; that Brinkman identified the buyer of the Company as Columbia Propane; and that during this meeting Brinkman did not say anything about the Union or the union petition which had been filed. On cross-examination Stice testified that he never complained about Beckham's rate of pay; that he went to lunch with Brinkman on February 2; that he had been to lunch with Brinkman several times before when Brinkman took them all out to lunch; that Yates did not accompany them to lunch on February 2; and that after lunch he spoke to Yates about the gun incident and the sexual harassment scheme. Yates testified that at this meeting Brinkman basically outlined the content of a managers' conference call which she was not available for the day before regarding the possible buy-out of the company; that during the meeting Beckham asked Brinkman how it was going to affect getting the Union in there and Brinkman answered that he was not at liberty to discuss that; that Brinkman did not say anything else about the Union petition or the union organizing; that during her subsequent meeting with Brinkman and Beckham she indicated that (a) she had been having productivity problems with Beckham in that a lot of cylinder accounts were running out of gas and she was getting telephone calls from the accounts, and (b) Beckham was seen leaving the plant at approximately 3 p.m. the day before[7] and Beckham did not notify her of this; that the truck which Beckham normally used to transport propane cylinders had broken down and it was beyond repair; that in January she was told that the corporate office was going to be ordering a new vehicle to transport the propane cylinders; that although he gave it as an excuse, the fact that Beckham had to use a service utility vehicle without a lift gate, which vehicle was only capable of carrying 24 cylinders (vis-a-vis 80 cylinders on the cylinder truck with a lift gate which was normally used), did not have anything to do with Beckham's ability to transport sufficient product to his accounts; that Brinkman indicated to Beckham that he preferred that Beckham fill the cylinders at the end of the day and not in the morning; that after Brinkman left Stice asked her if Brinkman said anything else to her about the buy-out and if they were still going to have jobs; that she told Stice she did not know; and that she and Stice then had the following conversation;

[6] Beckham testified that the engine on the stake-bed truck was throwing about 4 or 5 quarts per 100 miles and it was decided that it was not worth repairing; that the pickup he had to use since November 1998 was a service vehicle with a utility bed, and he could only transport 24 cylinders at a time on it; and that this meant he could not give all of his customers the number of cylinders that they could use when he was on his rout and this sometimes necessitated catching them on another route day or, if it was crucial, going back that same day or having Yates take some cylinders out herself.

[7] The normal working hours are 8 a.m. to 4:30 p.m.

> He said, do you believe that Beckham . . . [has] been hounding me . . . to . . . he wants to write up a letter, send it to the corporate office saying that at two different times you havegrabbed each of our crouches [sic] and he wants me to signit and go along with him and he's been bugging me andbugging me about it to sign it.
>
> He said, well, I have something else to tell you and youcan't tell anybody. And I said, I won't. He said, yeah, hesaid , he pulled a gun on me. And I go what do you mean. He said, yeah, he said last week he walked up to me, I was standing by ... the truck and he pointed a gun at me. And Iasked him—he said that he asked him what's that for and Beckham told him that he uses it—he carries it when hegoes on the East St.— goes to the East St. Louis Schnuck's Store. And then he showed him how he keeps it in back—keeps it in the back of his belt in a little holder.

Yates further testified that when she told her husband that evening about what Stice said regarding Beckham, her husband told her that she needed to tell somebody. On cross-examination Yates testified that on February 2 she did not know who was going to buy the company; that Stice did not make a comment about a competitor might close the facility; that at the meeting with Brinkman and Beckham, Beckham complained to Brinkman about her behavior in that Beckham complained that she stole his overtime, and he had to make service calls on the weekends that he was on duty; that Beckham did not speak to Brinkman in her presence about her use of comp time or doing personal errands on company time; that after Stice told her about the gun and sexual harassment she told him for the first time that Beckham was trying to get Stice's bobtail (tanker) route; and that she told Beckham that the company ordered a new truck in January. On redirect Yates testified that at the time of the hearing herein, June 22, she had a trailer for delivering propane cylinders; and that Beckham could have just worked a little harder to get those cylinders delivered using whatever vehicle Respondent had. Subsequently, Yates testified that when Beckham was making deliveries with the stake-bed truck she could not recall that there was ever a problem with Beckham making sure that his accounts had sufficient cylinders on hand; and that she never spoke to Beckham about his accounts not having sufficient cylinders on hand while he drive the specialized truck. Subsequently Yates testified that Brinkman never took the three people at the Moro facility out to lunch when he made his visits to the facility; that once she and Brinkman went to Burger King; that she was not aware that Brinkman and Stice went to lunch together on February 2; and that Stice told her that

> Beckham walked up to him and said, look what I got and pointed a gun at him. And Stice said what's that for. And Beckham said, I use it—I carry it with me when I go on my East St. Louis Schnuck's route and he proceeded to show Stice how he neatly tucks it back behind his—behind his pants in his belt

Yates further testified that Stice did not tell her that Beckham said that "this is for niggers in East St. Louis or anyone else who gives me any problems." On recross Yates testified that Stice did not say anything about a holster and Stice "said he showed me where he keeps it in the back of his pants on his waistband is exactly what he said." Brinkman testified that the conference call the day before was company-wide and not limited to district managers; that it was the purpose that the information would be distributed to all hourly employees as well; that he went to the Moro plant to tell the people there about the sale of National Propane to an unknown company at that time; that the question of the sale with regard to the Union was raised but he indicated that he was not at liberty to discuss that matter; that the previous Friday Yates faxed a petition, General Counsel's Exhibit 2, to him which had been filed with the National Labor Relations Board (Board); that Yates asked him to sit in on a subsequent meeting that she was going to have with Beckham; that during this second meeting Yates told Beckham that he was not delivering as many cylinders as she felt he was capable of delivering to several accounts on the day she had expected him to do it; that Beckham indicated that with the equipment he was assigned it was impossible; that he told Beckham that he knew that they were short a vehicle but he would have to work the best that he could with the equipment that they had at the time; that Beckham felt that he was doing a good job, as much as he could with the equipment he was assigned; that he thought, in honesty to Beckham, it would have been a little harder for him to make the deliveries; that on February 2 he had lunch with Stice at Hardee's Restaurant; that during lunch Stice asked about the Union and the possible sale of the company and he told Stice he was not at liberty to discuss anything about the Union; that following his meeting with Yates and Beckham, he did not, to the best of his knowledge, tell Beckham that he should not have gone to the Union and he should have contacted him first; and that he never told Beckham that he should take his problem to him instead of seeking union representation. On cross-examination Brinkman testified that he was aware that there was a lot of personality problems at the Moro facility.

Beckham testified that after this meeting with Brinkman he spoke to Stice about going over Brinkman's head and writing a letter to Don Ellis complaining about Yates; and that the letter was not going to refer to sexual harassment.[8] On redirect, Beckham testified that Stice said if Beckham wrote the letter, he would sign it; and that he never did write the letter because he decided that he had stuck his head out too far by going to Brinkman.

Stice testified that, after the meeting with Brinkman, he told Yates about the gun incident and about Beckham's proposal that he say that Yates fondled him and Beckham was going to be his witness and back him up. On cross-examination Stice testified that several times Yates told him that Beckham wanted his bobtail (tanker) route and while he thought this was funny it disturbed him.

Yates testified that on February 3 she telephoned Brinkman and told him that she had some confidential information she wanted to fax to him; and that she then faxed a letter to Brinkman, Respondent's Exhibit 3, which, among other things, de-

[8] Beckham denied that he ever asked Stice to falsify a report against Yates indicating that she had sexually harassed them by grabbing their private parts.

scribes her conversation with Stice on February 2 and which requests that Beckham be removed before further problems escalate.[9] Brinkman testified that he received the fax from Yates; that he telephoned his supervisor, Ellis, and faxed Yates' memorandum to him; that subsequently Jim Schreiber, who was Respondent's director of human resources and who at the time of the hearing herein no longer worked for Respondent, told him that they would need a written statement from Stice; that he spoke to Stice about needing a written statement but he could not recall the dates of these conversations; that initially Stice was not willing to give a written statement but Schreiber indicated to Brinkman that a written statement was necessary; and that, as set forth below, on February 12 Stice signed a statement. On cross-examination Brinkman testified that when he first asked Stice for a written statement Stice refused; that later he received a telephone call from Stice "wanting to know . . . what action we were going to take because he was becoming more concerned"; that he told Stice that he needed a signed statement; that he did not draft the statement and he did not know who did; and that he received the statement by fax. Schreiber testified that he was given a copy of the letter Yates faxed to Brinkman; and that he then discussed the matter with corporate counsel C. David Watson, and general manager Ellis, and it was decided that they needed a signed statement from Stice. When asked why did they think it was important to have a signed statement Schreiber testified as follows:

> A. Well, everybody signs papers, signs checks, signs mortgages, there is more weight and we certainly determined that it was appropriate to give more weight to a statement that was signed by somebody as opposed to having a third- hand account by the manager.

Schreiber further testified that at the time he was not aware of the personal issues between Yates, Stice, and Beckham; that he never became aware of the so-called history of issues between them; and that he had a conversation with Brinkman about the importance of a signed statement by Stice.

Stice testified that the day after he told Yates about the gun incident and the sexual harassment proposal he spoke with Brinkman who told him that if he wanted the Company to do anything about the matter he would have to sign an affidavit or give a signed statement; that he did not immediately agree to sign a statement for Brinkman, telling Brinkman that he would have to think about it; that he signed the statement in less than a week; and that he signed the statement 9 days later. On cross-examination Stice testified that when he met with Brinkman about the handgun incident and the sexual harassment allegation Yates was present; that he told Brinkman what he knew and Brinkman wrote it down in front of him and said that he had to have it typed; and that when he gave Brinkman the information for the statement he gave the approximate date of the 28th for the incidents. Although specifically asked who was the person who interviewed Stice, Brinkman did not specifically testify about a face-to-face interview with Stice with Yates present regarding the alleged gun incident where Brinkman took notes and he said that he had to have it typed. Brinkman did testify that he was talking to Stice and he passed the information on to the home office and a statement was written based on the "discussion I had with Mr. Stice and" also Yates' letter received herein as Respondent's Exhibit 3. Schreiber testified that Brinkman made him aware of Stice's unwillingness to sign a statement; and that he subsequently discussed the situation with Watson and Ellis and then told Brinkman that they "were very hesitant at that point to take verbal information we received second-hand from Denise Yates and make a decision regarding termination of employment. And we said, its very important at this point to get a signed statement from Mr. Stice." On cross-examination Schreiber testified that he certainly had concern as to whether or not Stice was telling the truth about these accusations and that was the reason "we requested that he sign his name to the allegations."

On February 3 Beckham stopped at Andy's True Value Hardware Store in Worden, Illinois on his way home from work and made a cash payment for a handgun that he wanted to order. Yates testified that at the end of April she was inventorying the mileage of the utility truck and in it she found a receipt made out to Beckham dated "2-3-1999" for "1 CZ50 32ACP Pistol," Respondent's Exhibit 4.

On or about February 5 Beckham, while using a company vehicle, stopped at Wal-Mart in Wood River, Illinois and purchased three boxes of cartridges for the handgun he ordered on February 3. Beckham testified that the ammunition was in the factory cartons and in a Wall-Mart bag; that he brought the ammunition into the Morro facility and placed it on his desk; that Stice asked him what he had in the bag; that he told Stice that he stopped and picked up some "shells for my 32"; and that he never showed the bullets to Yates. On cross-examination Beckham testified that the ammunition was on his desk for about 10 minutes at the end of the day; that the ammunition was not placed on the countertop; that he was passing the Wal-Mart and purchased it at that time to save a trip back down to Wal-Mart later; and that the hardware store where he ordered the handgun had just started to sell guns and did not sell ammunition. On redirect Beckham testified that he buys ammunition at Wal-Mart because it is cheaper. Stice testified that on one occasion Beckham brought some "bullets" into the plant and he placed them on his desk and on the counter; and that the "bullets" were in a clear plastic bag and the white boxes were marked "Winchester."

On cross-examination Stice testified that he did not ask Beckham what was in the bag, he did not ask him if he had gone shopping that day and he did not talk to him about the bag at all. Yates testified that at the end of the day on February 8 Beckham placed "little bullets to a pistol" up on the counter in front of her desk; that she "could tell it was bullets . . . [she] could see them"; that the "bullets" were in a Wal-Mart bag; and that she could see the "bullets" so the container inside the Wal-Mart bag was clear plastic. Subsequently Yates testified that the "bullets" were in a blue plastic bag; that the "bullets" were

[9] The letter reads in part as follows:

> Jack Mike Stice also told me that 1 day last week , Michael Beckham showed him a real gun and had pointed it at him saying See what I got.' Jack Mike Stice was startled and asked what it was for and Michael Beckham told him it was for when he went on his cylinder route to the East St. Louis Schnucks store.

packaged in what looked like a clear container which she could see through because she could see the "bullets"; that she could not see all of the packaging; and that what she saw of the inner packaging was clear. On rebuttal Beckham testified that the "bullets" were in three white cardboard boxes with Winchester in red printed on the box; and that he did not have any "bullets" in a plastic see-through container.

On February 12 Stice signed a statement, Respondent's Exhibit 2, which reads as follows:

STATEMENT OF JACK MILE STICE

1. On or about January 28, 1999 I was approached by Michael Beckham who requested that I verify and legitimize a false story that Denise Yates (the Bethalto, IL District Manager) had grabbed both his and my privates so he could file a sexual harassment charge against Denise Yates. I told Michael Beckham that Idid not want any part of falsifying a story for a sexual harassment charge.
2. While at work and while on company property, on or about January 28, 1999 Michael Beckham showed me a gun which was pointed at me. I asked him what the gun was for and he indicated that he took the gun with him when he went to the East St. Louis Schnucks area. He indicated that he placed the weapon on his back inside his belt.
3. I told District Manager Denise Yates about theseincidents on or about February 3, 1999.
4. Since these incidents, particularly the weapon incident, I have a great concern for my personal safety and well being.

The statement is typed except for the signature, the date of the signature, and the handwritten, underlined numbers "28" in paragraphs 1 and 2. On cross-examination Stice testified that he was not sure of the date when Beckham requested that he legitimize a false story; that this request was made several different times; that the third time occurred on January 28 which was the same day Beckham showed him the gun; that Beckham made the sexual harassment proposal about 8:30 a.m. on January 28 and later that day at 10:30 or 11 a.m. Beckham pointed a gun at him; that he was sure that January 28 was the day Beckham showed him the gun; that he knew that Beckham went to East St. Louis on Thursdays since he himself used to drive that route; that he felt threatened by Beckham pointing the gun at him and saying "this is for them niggers in East St. Louis or anybody else that gives me any problems"; that he felt that Beckham was referring to him since he told Yates that Beckham was goofing off and it caused a problem for Beckham; that Beckham spent at least a couple of hours a day at Carrol Supply where his girlfriend works; that it was an ongoing problem during the last 6 months Beckham was employed at Respondent;[10] that he complained to Yates a lot about it; that he told Yates about it twice; that Yates did not tell him that she had spoken to Beckham about this problem; and that it was long before the gun incident that he told Yates about Beckham goofing off. Stice further testified that blank spaces were left in paragraphs 1 and 2 of his statement as set forth above for him to fill in the date, viz., 28th. On cross- examination Brinkman testified that he brought the statement which was faxed to him to Stice at the Moro plant; that there were blanks for date of January 28; that Stice determined the date; that previously Stice told him that the incident occurred in the latter part of January; that previously he had discussed the gun incident with Stice; and that the statement was based on information he gave the home office from his discussion with Stice and from Yates' memorandum. Schreiber testified that he prepared the statement based on conversations that he had with Yates and Brinkman and the information that was contained in Yates' above-described letter; that he faxed the statement to Brinkman; that he left the actual date in January blank because "the statement wasn't real clear when the incident occurred and so he worded it with a blank there so Stice could fill it in"; and that he did not go to Moro and speak to Stice because "[t]he letter that Ms. Yates wrote was pretty detailed in terms of what occurred. I also had some subsequent conversations with her and Mr. Brinkman."

According to the testimony of Schreiber, the decision to terminate Beckham was made on Monday, February 15 after they received the statement of Stice. Schreiber testified that he, Watson, and Ellis made the decision to terminate Beckham; that Rule 3 of the employee handbook, as set forth above, specifically states use of or possession of firearms/weapons is prohibited on company property and it is grounds for disciplinary action up to and including termination; and that at the time of the termination he had been in human resources with Respondent for approximately 4 years and during that time he had never had a situation where an employee brought a weapon onto company property for any reason. When asked why Respondent did not give Beckham some other form of discipline Schreiber responded as follows:

> A. I think it is appropriate in today's environment particularly with workplace violence that companies have a zero tolerance policy relative to weapons. That was our position relative to use of alcohol while somebody was driving our company vehicle. It was our policy relative to possession of weapons, zero tolerance.

Schreiber also testified that Beckham would have been terminated if Respondent was aware that he brought a gun onto company property to show it for sale.

On the morning of February 18 Beckham made a service call with the service pickup truck at Florissant, Missouri. Upon his return to the Morro facility he noticed that the taillights on the service truck were not working. He told Yates and she told him to take the Ranger assigned to her. Beckham testified that it

[10] GC Exh. 8 is a subpoena duces tecum which requests, among other things, "1. Route sheets or other documentation showing al propane deliveries to . . . Carrol Supplies in Roxana, Illinois and any time during the period November 1, 1998 through Feebruary 18, 1999, including, but not limited to, the date cylinders were delivered and the identity of the employee delivering cylinders." Counsel for Respondent did not dispute General Counsel's representation that he advised her that there was no route cards for this customer for the above-described period and that she did not receive from Respondent any documents responsive to that portion of her subpoena. Counsel for General Counsel requested that I infer from the lack of documents that there were no deliveries to Carrol Supplies from November 1998 through February 18, 1999

was a Thursday; that his Thursday route included East St. Louis; that when he returned to the Moro facility about 4:20 p.m. that day he saw a Madison County Sheriff's car parked in the company parking area with another car with an Iola license plate; that when he got out of the truck the Madison County Sheriff, accompanied by Schreiber, asked him to identify himself and whether he was carrying any guns or weapons; that the Sheriff frisked him; that the Sheriff searched the Ranger and then the service truck at the behest of Schreiber but found nothing; that he, Brinkman and Schreiber went into the driver's room in the facility; that Schreiber then said "today is your last day at National Propane . . . [and] I want your keys and I want your pager"; that he asked why pointing out that they did not find anything; that Schreiber said that they could not take that chance; that Schreiber asked him if he ever had a gun in the company truck to which he answered no; that Schreiber asked him if he ever had a gun in his personal car out in the parking lot and he replied maybe on one occasion; that Schreiber asked him what occasion that would be and he replied "if . . . he] was going to the gun shop after work to sell it or to try to trade it or if . . . [he] was going to the shooting range. . . ."; that he explained to Schreiber that it would have been cased, unloaded and locked in the trunk of his car which is a legal carry in Illinois; that Schreiber said that he was terminated irregardless because they could not take that chance; and that Schreiber told him that they were going to file an order of protection against him because they did not want any trouble out of him. On cross-examination Beckham testified that if he had the time he goes shooting twice a week after work—sometimes using weapons supplied at the range—and on more than one occasion he would have a weapon in the trunk of his car at work; and that he did not explain this to Schreiber on February 18. On cross-examination Yates testified that February 18 was chosen to discharge Beckham because that was the day that he was supposed to go on his East St. Louis route, she had agreed with Schreiber to have a sheriff there to search Beckham, and Schreiber said that he wanted to be in Moro when the sheriff came to see if Beckham was carrying a gun in his company vehicle; that the purpose of having the sheriff there was to see if Beckham was carrying a gun in his company vehicle or on his person; that she was present in the drivers room when Schreiber terminated Beckham and Schreiber never said anything to Beckham about the sexual harassment accusation; that she never said anything to Beckham about the sexual harassment accusation; that she never asked Beckham for his side of the story; that she never confronted Beckham with Stice's accusation about the gun either; and that at the time of Beckham's discharge Stice was making $10.25 an hour. Brinkman testified that he did not participate in the decision making process to terminate Beckham; that he was present when Schreiber told Beckham that he was being terminated and he heard Schreiber ask Beckham if he ever had a gun on company premises; that he heard Beckham reply that "he may or may not have had to stop by a shop sometime and pick up a gun because he did own several guns, but, you know, during the course of the day"; and that Beckham did not reply that he'd brought a gun to work one day to show to Mr. Stice because he was interested in selling that gun to Mr. Stice. On cross-examination Brinkman testified that after the above-described statement was signed on February 12, he discussed with Schreiber that since Beckham was going to be making his East St. Louis delivery on February 18 that would be the date to bring the sheriff to the office to search Beckham's vehicle; that the date of February 18th was chosen because that was the date that Beckham was going to do his East St. Louis route; that the sheriff was going to search Beckham and the vehicle to see if Beckham was carrying a gun; that the sheriff was also there for the safety of the people involved who knew "of the gun incident or the alleged gun incident" (emphasis added),[11] that campaign literature was distributed to employees encouraging them to vote against the Union and it was a fair assumption that Respondent was not in favor of the Union representing the employees at Moro; and that no gun was found on February 18. Schreiber testified that on February 18 in the drivers' room he asked Beckham if he ever had a gun on company property and Beckham denied it; that he told Beckham that he had information to the contrary and Beckham's employment was being terminated; that Beckham "did say something, he might have had one in his vehicle when he was selling it or something to that effect" but he never said that he had actually brought one on the premises to show Stice; that he was partly responsible for asking the sheriff's office to send an officer to Respondent's Moro facility explaining to the Sheriff's Department "that we were terminating an employee that we had a written statement, had carried a weapon on company property, and asked for them to be present"; that "they were there because of our concern for our safety, not to find a weapon on Mr. Beckham; that he told Beckham that there was going to be a request for a restraining order; that the weapon issue was the significant issue and the alleged sexual harassment charge paled in comparison; that February 18 was picked as the day to have the termination meeting with Beckham because there was some discussion that that was the day that he made his visit to East St. Louis; that also the decision was made on Monday, he had commitments on Tuesday and Wednesday morning and he drove to St. Louis on Wednesday afternoon so he could take the action on Thursday; that Respondent thought it was important for somebody from the Cedar Rapids, Iowa corporate office to be at the facility and manage the termination process; that Thursday was the first available day that he had that week; that in reaching the decision to terminate Beckham he did not have any knowledge that Beckham had any particular role one way or the other in the union's representation petition; and that Yates had told him about Beckham bringing ammunition into the Moro plant immediately after it happened on February 8. On cross-examination Schreiber testified that in 1998 Respondent gave out a high powered rifle as a performance premium to an employee; that he was not interested in trying to catch Beckham in the act; that the decision that Beckham was going to be terminated was made on Monday, February 15 in Cedar Rapids; that the sheriff was there just to

[11] Interestingly, while Brinkman testified on cross-examination that it would be normal to be concerned with wanting to determine whether or not Stice was telling the truth, and while he discussed the "alleged" gun incident with Stice, neither he nor Schreiber, nor Yates asked Beckham about the "alleged" incident before the decision was reached to terminate Beckham.

insure the safety of the of the employees and himself; that he knew that Thursday was the day Beckham generally made the East St. Louis run "but it was not a given on any week"; and that it made no difference that there was no substantiation of Stice's story as it turned out. Subsequently Schreiber testified that notwithstanding the fact that Stice's statement reads "I asked him what the gun was for and he indicated that he took the gun with him when he went to the East St. Louis Schnucks area," the fact that Beckham did not have a gun on the day he was supposed to go to East St. Louis did not make him question the allegation even though the sentence does not read "sometimes."

Respondent's Exhibit 1 is a temporary restraining order filed March 2 which, as here pertinent, contains the following language:

> NOW THEREFORE, IT IS HEREBY ORDERED THAT:
>
> 1) That Defendant Michael Beckham is enjoined from going about any premises owned by Plaintiff, National Propane, a limited partnership, in the State of Illinois and that he is further enjoined from coming about or going upon any of the property owned by any of National Propane's agents, servants, and employees provided further that he is specifically enjoined from going upon the property of Denise Yates in Dorsey, Illinois or coming about her person and also the property of Jack "Mike" Stice in South Roxana, Illinois or anywhere near his person.
>
> 2) That this Temporary Restraining Order is given without notice and that the Court finds that Defendant could be armed and dangerous and due to his termination from his employment with National Propane, vengeful and filled with malice so as to act immediately to the harm of the property and the individuals from which he is enjoined from.

General Counsel's Exhibit 5 are the documents pertaining to the temporary restraining order. One, the complaint, contains, as here pertinent, the following:

> 4) That because, Defendant Michael Beckham came upon the premises owned by National Propane with a loaded firearm on January 28, 1999, Plaintiff has a substantial fear that Defendant, Michael Beckham may come upon its premises with said firearm for the purposes of doing bodily harm and or property damage. [Emphasis added.]
>
> 5) That specifically, Jack "Mike" Stice and Denise Yates were assaulted or threatened by the presence of Michael Beckham at the facility while carrying said firearm. There is no evidence of record in this proceeding that Yates was directly "assaulted or threatened by . . . Beckham at the facility while carrying ... a firearm." Yates testified that the restraining order was her idea; and that she suggested it to Schreiber. Schreiber testified that Yates suggested the restraining order in a telephone conversation before he went to Respondent's Moro plant.

On cross-examination Beckham testified that in his March 9 affidavit to the Board he indicates that he asked Stice if he would give a Board agent a statement confirming that he never brought a firearm on the company's premises; that he did not believe that this was a lie because having it locked in the trunk of his car "was not bringing it in the company's premises . . . [in that] it was a public parking lot on Route 140"; that the Company owns the parking lot but everyone parks there that comes there for business; that it would not have been a true statement that he never brought a firearm on company premises; and that Stice told him that he would not lie for either side. On further redirect Beckham read the following portion of his March 9 affidavit which he gave to the Board:

> I'm sure that I was working on January 28, 1999, and I never brought a weapon to work. This is the first time I had heard that I had brought a firearm to work on 1/28/99. I had never done anything remotely close to what the company is alleging. It is completely ludicrous. If I really did bring a firearm to threaten anyone on January 28, 1999, then why would the company wait until February 17, which should have been the 18, 1999, to terminate me for this alleged offense. It just doesn't make any sense that they would wait almost 3 weeks to report it to the authorities.

On March 15, 1999 Stice gave an affidavit to the Board, General Counsel's Exhibit 6. As here pertinent, it reads as follows:

> 4. Sometime in late January (Jan. 28, 1999) I was fueling my truck in the parking lot at work. Then, Beckham came up to me and pointed a gun at me. The gun was about one foot away from me. It was a silver 25 semi-automatic.
>
> 5. Beckham said, 'what do you think of this?' while he pointed it at me. I said, 'yeah, well it's a gun.' He said, 'I carry on my East St. Louis route because there's a lot of crime and I don't trust them niggers over there' I was scared and in shock. He walked away. I took his action as a form [of] intimidation.
>
> 6. About 1 week earlier, I had informed Yates that I had seen Beckham's truck parked at Carol Supplies, the place where Beckham's girlfriend works, on many occasions. I didn't think he should be wasting work time there.
>
> . Several days later, Yates told me that she'd spoken to Beckham and told him to stop goofing off.
>
> 8. At . . . [the] time, Beckham approached me in the parking lot and said, 'I'm going to beat your fucking head in if you don't mind your own business.' I didn't say anything. He was screaming and hollering at me when he said this. I figured he was going to hit me.

Stice testified on cross-examination, with respect to the affidavit, that a week before the gun incident he probably had again informed Yates about seeing Beckham's truck parked at Carrol Supply, that he told her two different times; that this was the second time and this time Yates told him that she had spoken to Beckham and told him to stop goofing off; that this was when Beckham approached him in the parking lot and told him and said that he was going to beat his "f'ing head in" and this was within days of the gun incident, within the week of the gun incident and that is why he felt so threatened; that he did not know if the gun was a 25 caliber or a 22 and he told the person taking the affidavit he did not know; and that the affidavit does not refer to a black holster.

Yates gave the following testimony on cross-examination:

> Q. Okay, now did you have a problem with Stice at—concerning GM Scrap?
>
> A. I didn't have a problem, he had forgotten to—there are certain accounts where they will pay cash and he had forgotten to turn the money in and I just had to remind him.
>
> . . . .
>
> A. I confronted him immediately and he turned in the money.
>
> Q. Didn't he give— didn't you have to call GM Scrap —didn't he tell you initially that he had not made delivery there?
>
> A. He didn't know what I was talking—he told me that he didn't know what I was talking about.
>
> Q. Okay, and then you had to call GM Scrap?
>
> A. Yes.
>
> Q. And they confirmed that he had made a delivery?
>
> A. Yes, that was the next day, yes.
>
> Q. Okay, and then you asked Stice for the money?
>
> A. Correct.
>
> . . . .
>
> A. No, he brought it, I didn't have to ask him for the money, he offered it to me.
>
> Q. Okay, you reminded him that he had made a delivery—or you told him that you had talked to GM Scrap and they had said that he had made a delivery?
>
> A. I had walked outside and asked Stice if he delivered to GM Scrap. This was—they always turn in the report and the money that—either that day or the very next day, and I had asked him and he had a puzzled look like, no. And then I said well you always collect and they usually pay you on delivery, well then I went inside and called and maybe an hour later he came in and gave me the money.
>
> Q. Okay, didn't you report this to Brinkman?
>
> A. Yes.
>
> Q. Okay, but no action was taken against Stice, correct?
>
> A. It wasn't something that—
>
> . . . .
>
> THE WITNESS: It wasn't something that was uncommon.
>
> The guys put it in their wallet and forget.

Analysis

Paragraph 5A of the complaint alleges that in mid-to-late January 1999 Respondent, by branch manager Yates, at Respondent's Moro facility, threatened employees with discharge if they selected the Union as their bargaining representative, and advised employees that other employees who supported a union in the past were discharged. Paragraph 5B of the complaint alleges that in mid-to-late January 1999 Yates threatened employees with plant closure if they selected the Union as their bargaining representative. And paragraph 5C of the complaint alleges that in early-to-mid February 1999 Yates threatened an employee with discharge if the union organizing efforts were successful.

On brief Counsel for General Counsel contends that where conflict exists between the testimony of Beckham and the testimony of Respondent's witnesses Beckham should be credited; that while Beckham testified in a straightforward manner, Stice, among other things, fabricated testimony about seeing Beckham's truck at Carrol Supplies on or about January 21, 1999 because, as demonstrated by Beckham's testimony, the lack of any documents showing deliveries to Carrol Supplies after October 1998, and the testimony of Beckham's wife that she did not work at Carrol Supplies after the beginning of November 1998, there would have been no reason for the truck to be there; that Yates was not a credible witness in view of her testimony about (a) being able to see the actual "bullets" which were in a cardboard box, (b) Beckham receiving a disproportionately large wage increase because he needed it and not because he was a valued employee, and (c) Beckham's alleged lower productivity not being due to the breakdown of his stake body truck; that to the extent that Respondent argues that Yates was simply making a prediction based on Respondent losing money, the Board has recognized the right of an employer to make predictions as to the precise effects he believes unionization will have on his company but the predictions must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control, *Engineered Control Systems*, 274 NLRB 1308, 1313 (1985); and that Yates' statements contain no such objective fact and are simply threats of discharge and plant closure if employees unionize.

Respondent on brief, argues that the complaint should be dismissed in its entirety because the sole witness offered by the General Counsel to support every allegation in the complaint is an admitted liar who attempted to suborn perjury; that it is axiomatic that "[t]he testimony of a perjurer is inherently unreliable and, absent corroboration, should not be the basis for finding a violation of the Act", *McCotter Motors Co.*, 291 NLRB 764, 768 (1988); that as pointed out by the Board in *Lear-Siegler Management Service*, 306 NLRB 393, 394 (1992), "threats to induce a witness to testify in a certain way in a Board proceeding constitute serious misconduct . . . [and] the integrity of the Board's judicial process depends on witnesses telling the truth, as they see it, without fear of reprisal or promise of reward"; that Beckham lied at the hearing herein about the handgun sale to Stice, he lied when he claimed that he only brought a gun to work on one occasion, and he lied to the Board when he claimed the Company's allegations were "completely ludicrous"; that Beckham attempted to have Stice commit perjury and Beckham thereby showed a flagrant disregard and disrespect for the integrity of the Board's process; that General Counsel's attack on Yates' and Stice's credibility failed to demonstrate that the company violated the Act; that even if General Counsel were successful in calling into question the accuracy of Stice's and Yates' testimony, at best General Counsel could only establish that these two employees were motivated by personal animosity and not anti-union animus; that even if a story was concocted to get a coworker fired it would not be a violation of the Act in that an employer does not violate the Act as long as its actions were not motivated by union animus, *Borin Packing Co.*, 208 NLRB 280 (1974); that,

at best, General Counsel demonstrated that Yates and Stice had a personal vendetta against Beckham which resulted in Beckham's termination which, even if true, failed to show the Company violated the Act; that assuming arguendo that Yates told Beckham that the plant may close and that they may lose their jobs if the Teamsters become their bargaining representative, the Company still did not violate the Act; that since *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Board has consistently ruled that an employer may inform its employees about the possible consequences of union activity; that employers may lawfully discuss the possibility of plant closure, *Somerset Welding & Steel, Inc.*, 314 NLRB 829 (1994), and the possibility of job loss, *CPP Pinkerton*, 309 NLRB 723, 724 (1992); that even if Beckham's uncorroborated allegations could stand on their own, there is still no violation of Section 8(a)(1) since General Counsel offered no evidence to refute the fact that the Moro facility was not making money; and that Yates alleged statements are legitimate possible consequences union representation may have on a company in a fragile financial state.

All three of the people who worked at the Moro facility at the involved time have lied at one time or another. The difference between Beckham, on the one hand, and Yates and Stice, on the other hand, is that Beckham, while under oath, attempted to tell the truth. The other two, on the other hand, decided, in my opinion, that it was not necessary to even attempt to tell the truth while under oath. As noted by Counsel for General Counsel above, both Yates and Stice were caught being less than truthful under oath about material facts on more than one occasion and neither one thought that it was necessary to attempt to explain, backpedal or recant. In my opinion Yates made the statements she is alleged to have made in paragraph 5 of the complaint. Some of the statements were outright threats of discharge, with some made in terms of probable discharge. Others were made in terms of what would probably happen to the plant. While an employer may inform its employees about the consequences of union activity, as pointed out by Counsel for General Counsel, the predictions must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. Yates' statements, however, were made in a coercive context in that the first time she engaged in this type of conduct her statements were not couched in terms of probable consequences beyond the employer's control. With respect to Respondent's above-described argument that General Counsel offered no evidence to refute the fact that the Moro facility was not making money, it was not established on the record herein that the Moro facility was not making money. Indeed, the evidence of record indicates that Yates said that "the company can't afford to hire a service man. We didn't make enough money last year. (Emphasis added.) How much is "enough" was never established. But "enough" is not the same as "not making money." In any event, Yates' statements were not predictions which were carefully phrased on the basis of objective fact to covey Respondent's belief as to demonstrably probable consequences beyond its control. Respondent violated the Act as alleged in paragraphs 5 A, B, and C of the complaint.

Paragraph 5D of the complaint alleges that on or about February 2, 1999 Respondent, by area manager Brinkman, in the parking lot of Respondent's Moro facility advised an employee that employees should bring problems to Respondent instead of seeking union representation.

General Counsel on brief contends that Brinkman's statement implies that Brinkman would have resolved Beckham's problems and still might in the absence of the Union and, in the context of a union organizing campaign, therefore constitutes an unlawful solicitation of grievances and implied promise of benefits.

On brief, Respondent argues that since Brinkman denied making the statement, it is Beckham's word against Brinkman's; that for the reasons described above Beckham was not a credible witness; that, on the other hand, there is nothing in the record which questions Brinkman's credibility or supports any assertion that he is opposed to unions; that during the February 2 meeting Brinkman told the employees present that he was not at liberty to discuss the Union with the employees; and that it would defy common sense to conclude that Brinkman would then approach Beckham to talk about the Union a short time later.

Both General Counsel and Respondent focus on the verbal communication to the exclusion of the nonverbal portion of this conversation. Brinkman was frustrated with the situation at the Moro facility. Earlier he had indicated that if the three people at this facility did not learn how to work together and make the operation run, they all might be fired. It is understandable how, while he would not discuss the Union in a formal setting in response to an employee's question, he would, out of frustration or something else, make the statement he is alleged to have made. But for our purposes, the nonverbal portion of the alleged statement is more important than the verbal portion. As noted above, Beckham testified that Brinkman approached him and said, "I wish you guys would have got ahold of me sooner and let me know about these problems over here before you went to the union with it"; and that he replied to Brinkman that he guessed that it was too late for that now and Brinkman shook his head to signify yes. The head shake said it all. Counsel for General Counsel takes the position that Brinkman's statement implied that he still might resolve Beckham's problems in the absence of the Union. This is contrary to the nonverbal communication with which Brinkman acknowledged that it was too late for that now. Brinkman agreed that the door was closed and not open. Respondent did not violate the Act as alleged in paragraph 5D of the complaint. In my opinion, Brinkman was still trying to get a read on Beckham. While Beckham asked a question about the Union during the meeting, Brinkman still wanted to see if Beckham, in a private conversation, would back off in his attempt to bring in the Union. When Beckham indicated that he guessed that it was too late to discuss the problems Brinkman agreed. It was too late for Beckham.

Paragraph 6 of the complaint alleges that about February 18, 1999 Respondent discharged its employee Beckham because he formed, joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

General Counsel on brief contends that the evidence clearly establishes Respondent's knowledge of Beckham's union activities as well as Respondent's animus toward those activities; that since the Union telephoned Beckham at work Yates would have logically concluded that Beckham was the driving force behind the subsequent union organizing; that Yates directed her threats of discharge to Beckham; that Yates pointed out to Beckham that a good work record was not an obstacle to discharge because there are offenses which do not require prior warnings before discharge; that the actions of Stice and Beckham are consistent with the fact that Stice fabricated the story and Beckham never did point a gun at Stice in that (1) no gun was found on Beckham or in his truck on a day when Beckham, according to Stice, would be carrying a gun, (2) Stice did not (a) contact the police even though he had allegedly been directly threatened with an apparently loaded gun or (b) immediately tell Yates, (3) Stice refused to sign a statement concerning the incident for 10 days, and (4) if Beckham had threatened Stice with a gun, he would never have telephoned Stice after the termination and asked Stice to step forward and say that the threats and assault did not occur;[12] that the superficial investigation of Stice's allegations belie Respondent's assertions as to the true reason for the discharge; that the investigation was conducted not to find out what actually occurred, but rather, to support Beckham's discharge; that no representative of Respondent confronted Beckham with the accusations before the decision was made to terminate him; that Respondent's lack of interest in the truth is further evidenced by the fact that Schreiber never even spoke directly to Stice about the incident, relying instead on second and third-hand accounts to draft the statement for Stice to sign; that Respondent's lack of interest in the truth is then capped by Schreiber's utter indifference to Beckham's denials and to the fact that Stice's story was not substantiated by the sheriff's search; that Respondent was simply interested in getting rid of the lead union supporter and fulfilling its threat made to Beckham back in January; that Beckham was a valued employee as evidenced by his wage history; that Beckham had a perfect work record and no evidence of discipline in his file; that although the Board has held that a discriminatee can forfeit his right to reinstatement for misconduct discovered after termination, it is Respondent's burden to establish that the conduct would have provided grounds for termination based on a preexisting policy and any ambiguities will be resolved against the employer; that while Schreiber emphasized that Respondent had a zero tolerance relative to possession of weapons he conceded that Respondent issued a high-powered rifle to an employee as a part of an incentive program; that the handbook only states that a violation of the weapons rule is grounds for disciplinary action up to and including termination; that, in contrast, two of the other rules are specifically designated as dischargeable offenses; and that the evidence establishes that Respondent does not have a propensity to discharge employees for any type of misconduct at the Moro facility and Respondent has failed to establish that it would have discharged Beckham for storing an unloaded, cased gun in the locked trunk of his car. On brief Respondent argues that regardless of an employer's knowledge of an employee's union activity and/or its union animus, a company faced with unlawful or possibly unlawful activity can discipline or dismiss the worker; that in *GHR Energy, Corp*., 294 1011, 1012 (1989), the Board found suspensions lawful because the Respondent reasonably believed that the employees had engaged in serious misconduct endangering other employees; that an employer's investigation of misconduct which is not thorough is insufficient to show a violation of the Act; that the Act only requires that the employer have a good-faith belief the employee committed an act of misconduct, *Goldtex, Inc*., 309 NLRB 158 fn. 3 (1992), enfd. 16 F. 3d 409 (4th Cir. 1994); that Beckham's denial of pointing his gun at Stice and threatening him is simply not credible in that Beckham lied (1) to Schreiber at his termination, and (2) to the Board agent when he stated that it was "completely ludicrous" that he ever brought a gun to work,[13] and he tried to get Stice to lie and testify that Beckham never brought a gun to work; that Schreiber testified that the fact that the Union filed a representation petition played no part in the decision to terminate Beckham and Schreiber has no reason to lie as he is no longer employed by the Company; that the fact that the termination occurred 3 weeks after the Union filed the representation petition, standing alone, is insufficient to establish an unlawful motive; that the fact that no representative of Respondent interviewed Beckham regarding the gun incident does not demonstrate that Beckham was terminated for unlawful reasons; that in light of the information available and the lack of union animus 'failure to interview other employees present or involved in the [incident] . . . and the decision to discharge [Beckham] before speaking with him' does not support a finding that the discharge was motivated by union animus, *Society to Advance the Retarded & Handicapped*, 324 NLRB 314, 315 (1997),[14] that Beckham's termination is still lawful even if his version of the events surrounding his encounter with Stice and the handgun is true for "Beckham not only admitted that he brought a handgun to work on several occasions, but he also admitted to removing it from his car at work for the purpose of selling it to Stice" (emphasis added);[15] that either way, he violated the Company's no weapons policy "which results in automatic termination of employment"[16] (em-

[12] Beckham testified that he asked Stice if he would give the Board agent a statement confirming that he never brought a firearm on the Company's premises.

[13] As noted above the involved affidavit reads as follows:

> I'm sure that I was working on January 28th, 1999, and I never brought a weapon to work. This is the first time I never brought a firearm to work on 1/28/99. I had never done anything remotely close to what the company is alleging. It is completely ludicrous. If I really did then why would the company wait until February 17th, which should have been the 18th, 1999, to terminate me for this alleged offense.

Beckham was referring to a specific date and a specific allegation. It is misleading to assert that by this language Beckham was claiming that he never brought a gun to work.

[14] R. Br. at 32.

[15] R. Br. at. 33. The record does not support this assertion. Indeed Beckham testified that he would not let Stice lift the handgun out of the trunk because he "did not want anybody calling in on us . . . . Tr. at 2.

[16] R. Br. at 33.

phasis added); that Beckham is not entitled to reinstatement or full backpay even if it is determined that the Company violated the Act by discharging him because "[a]fter acquired evidence of a nondiscriminatory reason for discharge pretermits back pay and eliminates reinstatement as a remedy," *Cook Family Foods, Inc.*, 323 NLRB 413, 420 fn. 41 (1997); that even if Beckham did not point a gun at Stice and threaten him, Beckham admitted at the hearing herein that he did have weapons in the trunk of his car while it was on Company property and he would have been terminated if the Company knew of the attempted sale to Stice; that therefore Beckham is not entitled to reinstatement should his termination be found to be unlawful; that Beckham should be barred from collecting backpay after June 21 since the Company learned of his misconduct at the June 22 hearing herein; that Beckham admitted in his March 18, 1999 affidavit that he attempted to sell a gun to Stice on Company property in 1998; that the Company should not have to compensate Beckham for the extra months of backpay due to the Board's refusal to release the information until the date of the hearing; and that also Beckham is precluded from receiving backpay after March 9, 1999, the date he asked Stice to give false testimony to the Board agent for as pointed out in Lear-*Siegler Management Service*, 306 NLRB 393, 394 (1992) 'a discriminatee who interferes with the Board's processes by attempting to influence . . . a witness in a Board proceeding will forfeit his right to backpay beyond the date of the impermissible interference.'

As set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983),

> [W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or 8(a)(1) turning on employer motivation. First we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [Footnote omitted.]

Beckham engaged in union activity and Respondent knew this. Yates made it a point to broadcast over the radio used company wide by Respondent that someone from the Teamsters had telephoned Beckham at work. There were only two eligible employees at the Moro facility. And when the Union representation petition was received by Respondent on January 28, Respondent has not shown that it had a reason to believe that Stice was responsible for what was occurring. With Yates' above-described threats, Respondent provided the needed antiunion animus. The fact that the decision to discharge Beckham was made just 18 days after Respondent received the Union's representation petition also supports a finding of antiunion animus. Counsel for General Counsel has made a prima facie case sufficient to support the inference that protected conduct was a motivating factor in the employer's decision.

Has Respondent shown that it would have taken the same action against Beckham in the absence of his engaging in union activity? Did Respondent have a sufficient business justification for taking the action which it took? In my opinion the above-described statement which Stice gave to the Respondent is false and Respondent knew this.

Stice had lunch with Brinkman on February 2. This was unusual and Stice knew this. That is why he testified that the three people at the Moro facility had together lunched with Brinkman in the past. The witnesses were sequestered at the hearing herein. When Yates took the stand she testified that Brinkman never took the three people at the Moro facility out to lunch when he visited the Moro facility. Also Brinkman testified that during lunch Stice asked him about the Union and he told Stice that he was not at liberty to discuss the Union. The problem with this testimony is that Beckham asked this same question and received this same reply at the meeting at the Moro facility just minutes (after the Yates, Brinkman and Beckham meeting and Brinkman's statement to Beckham) before Brinkman had lunch with Stice. Stice did not corroborate Brinkman on this point. Stice did not ask this question during the lunch. Apparently Brinkman was attempting to show that the lunch was nothing more than a continuation of the meeting at the Moro facility. Both Stice and Brinkman were not comfortable about this lunch when they testified. This was an unprecedented lunch meeting. We do not know for sure, however, exactly what was said during this lunch meeting. We do know that immediately upon his return from this Tuesday lunch meeting Stice allegedly told Yates for the first time that Beckham had pointed a gun at him on the prior Thursday.

Stice's story is a fabrication, and a poor one at that. As can be seen above, he was caught a number of times in lies about it. Beckham never pointed a gun at Stice and threatened him. If he had, with Stice's proclivities there is no doubt in my mind that Stice would have reported it to the police. If he was willing to report the fact that his girlfriend saw Beckham out and around when he was supposed to be sick, one would have to conclude that if Beckham did in fact threaten his life with a gun, he would not have hesitated to report it to the police. What kept Stice from taking such action is the fact that he would be criminally liable on an apparently less forgiving state level for filing a false police report. The statement Stice gave to Respondent does not make it clear that the pointing was not accidental. The statement that Stice signed for the Respondent does not include what Stice allegedly understood to be a verbal threat accompanying the pointing of the gun at him. Yates' letter to Brinkman also does not include the alleged verbal threat. Yates testified that Stice did not tell her that Beckham said that "this is for niggers in East St. Louis or anyone else who gives me any problems."

In the circumstances extant here could Respondent have a good faith belief that Beckham committed the alleged act of misconduct without anyone from Respondent asking him if he did it before the decision was made to terminate him. In view of the fact that Yates reported the above-described GM Scrap incident to Brinkman, notwithstanding Yates' assertions to the contrary, Stice's integrity was already in question. There were problems between Beckham and Stice. Stice resented the fact that Beckham, who was hired after him, received more money then him when he was hired. Stice resented the fact that

Beckham received more of a wage increase then he did. Stice resented the fact that on occasion he had to deliver to Beckham's accounts because Beckham was not able to service them properly with the replacement truck he was using. Stice complained about the way Beckham did his route. Stice complained about seeing Beckham's truck at Carrol Supply allegedly even when there was no reason for it to be there. Stice complained about Beckham misusing sick leave. And Yates told Stice that Beckham wanted to take Stice's route. Her testimony that she did not tell Stice this until after Stice told her about the gun incident is not credited. Stice testified that Yates told him this on more than one occasion. The situation got so bad in the past that Brinkman had to come to the Moro plant and tell the three that they all could be fired if they did not get along.

If Respondent wanted to determine whether it could rely on Stice's allegation, the situation cried out for a thorough investigation. But Respondent was not interested in making this determination for, in my opinion, it knew that the allegation was false. The cases cited by Respondent on brief to support its argument that an employer's investigation of misconduct which is not thorough is insufficient to show a violation of the Act are not on point. In Society to Advance the Retarded and Handicapped, 324 NLRB 314, 315 (1997), three females complained about a male and some of the complaints concerned alleged sexual harassment. There the Board concluded that the employer's sudden decision to discharge the employee after a less than thorough investigation was suspect but the evidence was not substantial enough regarding whether the employer knew of the union activity of the involved employee and antiunion animus so it did not rise above the level of mere suspicion. Here it is one employee's allegation. Here there is a history of problems between the two employees. Respondent is aware that the integrity of the one person who is making the allegation has been put in question in the past. Respondent is aware of the union activity of Beckham and there is antiunion animus. These two cases are quite different. In *Goldtex, Inc.*, 309 NLRB 158 (1991), there was a thorough investigation of the charges against the involved employee and he was confronted and suspended before the decision was made to terminate him. There it was determined that General Counsel failed to prove that the employer did not reasonably believe that the involved employee engaged in the misconduct alleged. There a handwriting expert found that the employee engaged in the misconduct alleged. There a state bureau of investigation was involved. Here only Stice was involved and in my opinion Respondent knew that Stice's allegation was false. That is why there was not a thorough investigation. In *GHR Energy Corp.*, 294 NLRB 1011 (1989), the employees accused of misconduct were confronted with the accusations and offered a polygraph test to prove their innocence. *Lucky Stores*, 269 NLRB 942 (1984), did not involve one employee's allegation of misconduct on the part of another employee. There various members of management caused the termination of the involved employee because they mistakenly believed she was revealing confidential information. There the Judge pointed out that while the belief was mistaken it was more than conjectural. Here Respondent would not have been acting reasonably if it had relied solely on the word of Stice in the circumstances extant here. But in my opinion Respondent was not relying on the allegation of Stice. And Frierson Building Supply Co., 328 NLRB 1023 (1999), is not on point for there a supervisor observed the conduct in question, antiunion animus was not demonstrated and the employee involved there did not have a good work record.[17]

Did Respondent know that Stice's allegation was false? In my opinion it did. As noted above, the witnesses were sequestered at the hearing herein. While Yates and Brinkman testified that February 18 was chosen for Schreiber's visit to the Moro facility because this was the day that Beckham was going to East St. Louis and this fact was discussed with Schreiber, Schreiber emphasized that he came to Moro on February 18 because this was the first time he had available after deciding to terminate Beckham. There was no real need for Schreiber to come to the Moro facility. It was done for "show and tell." It was done to show that Respondent put enough faith in Stice's statement that it would contact the Sheriff's department and have Beckham frisked and the truck he was operating searched. The decision to terminate Beckham had been reached days before and Schreiber testified that he was not concerned that no gun was found. Schreiber still had the same faith in Stice's statement after the search as he had in it before the search. Schreiber knew the statement was false so it did not matter that no gun was found.

Beckham did show Stice a small, cased, unloaded semiautomatic handgun Beckham had in the trunk of his car. Contrary to an assertion of Respondent on brief, there is no reliable evidence of record that the weapon was removed from the trunk of the car. Stice's testimony, namely, "I don't remember that [Beckham bringing a 25 caliber pistol to work to show it to him for the purpose of selling it], no" is not credited. It was not shown that such conduct was unlawful. But since this occurred on Company property there is a question whether it is a violation of a rule in Respondent's handbook, namely, "[u]se or possession of firearms/weapons is prohibited." On brief Respondent contends, in addition to the erroneous assertion that Beckham removed the gun from the trunk of the car, that a violation of the Company's no weapons policy results in an "automatic" termination of employment. As noted above, a violation of the rule regarding "[u]se or possession of firearms/weapons is prohibited" while on company property indicates that "[a] violation of any of the above is grounds for discipline up to and including termination. Also as noted above, a violation of two other rules specifically "will be a cause for immediate termination" and "is grounds for dismissal." If a violation for the rule involved here was grounds for automatic termination, why does not the rule specify such? This is especially perplexing in the light of the fact that other of Respondent's rules, in effect, do specify automatic termination. Respondent did not introduce any evidence that it had automatically terminated any employee for violating the rule in question. It is asserted that to Schreiber's knowledge no employee had previously violated the involved rule. I did not find

[17] On September 20, 1999, the Respondent filed a supplemental pleading for the purpose of bringing this recent case to my attention.

Schreiber to be a credible witness so I do not credit his testimony regarding what Respondent would do with respect to a violation of the involved rule. Additionally, if Schreiber's testimony is accurate, why hasn't Respondent amended the involved rule to indicate "automatic termination?"[18] Respondent violated the Act as alleged in discharging Beckham.

In *Lear-Siegler Management Service*, 306 NLRB 393 (1992), the Board tolled the backpay of an employee because that employee threatened a prospective witness to induce the witness to testify in a certain way in a Board proceeding. At 394 of its decision therein the Board held "that a discriminatee who interferes with the Board's processes by attempting to influence and manipulate a witness in a Board proceeding will forfeit his right to backpay beyond the date of the impermissible interference." Here Beckham attempted to suborn perjury in that he attempted to have Stice make a false statement in an affidavit he was going to give the Board. This came to light in an affidavit Beckham gave to the Board on March 9, 1999. The specific date on which the attempted subornation of perjury occurred is not specified. For our purposes on or about March 9, 1999 is sufficient. This matter can be "fine tuned" in a backpay compliance specification. As pointed out by the Board in footnote 6 in *Lear-Seigler*, supra, the dictum in *D. V. Copying & Printing*, 240 NLRB 1276 fn. 2 (1979), to the extent that it suggests that interference with the Board's processes (in that case subornation of perjury) alone, without accompanying threats, not only warrants tolling of backpay but also compels denial of reinstatement is overruled. Consequently, since there were no accompanying threats here, Beckham did not lose his right of reinstatement.

Paragraph 7 of the complaint describes the involved unit,[19] alleges that on August 14, 1998 a majority of the Unit designated and selected the Union as their representative for the purpose of collective bargaining and that at all material times since August 14, 1998, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the Unit for the purposes of collective bargaining with respect to wages, hours and other conditions of employment. Paragraph 8 of the complaint alleges that the conduct described above in paragraphs 5 and 6 is so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization cards would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone. And paragraph 9 of the complaint alleges that the conduct described above in paragraphs 5 and 6 is so serious and substantial in character as to warrant the entry of a remedial order requiring Respondent as of mid or late January 1999 to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. General Counsel, on brief, contends that both employees in the unit executed authorization cards which are 'single-purpose' cards that state the union is authorized to represent the card signer for purposes of collective bargaining and therefore unambiguously designate the Union as the employees' collective-bargaining representative; that an employee's purpose in signing such a card is conclusively presumed to be authorization of the union to represent him in the absence of evidence that the employee was clearly told that the sole purpose of the card was to bring about an election to determine the Union's status, *Eastern Steel Co.*, 253 NLRB 1230, 1240 (1981); that no such evidence was offered in this case and the cards were properly authenticated and admitted into evidence; that the Union's majority status was clearly established as of August 14, 1998; that a bargaining order is appropriate to protect employee sentiments and to remedy Respondent's misconduct; that the Board and courts have long held that the discriminatory discharge of leading union adherents has an especially pervasive effect on other employees, and serves to accomplish the destruction of employee support for unionization as would a greater number of unfair labor practices which individually have a lesser impact; that in a small unit the impact of such discharges has a far greater effect than in a larger one and practically makes a fair election impossible, *Eastern Steel Co.*, supra; that Respondent's threatening employees with discharge and plant closure are 'hallmark' violations and are among the most flagrant of unfair labor practices, *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992); that the evidence establishes that the possibility of erasing the effects of the Respondent's extensive and serious violations is slight and the holding of a fair election unlikely; and that a bargaining order in the circumstances extant here is appropriate.

On brief, Respondent argues that while the Board has found a bargaining order appropriate in small unit cases, *Bonham Heating & Air Conditioning, Inc.*, 328 NLRB 432 (1999), the alleged unfair labor practices here do not warrant such a remedy; that bargaining orders should only be a remedy if the 'coercive effects [of the unfair labor practices] cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had, '*NLRB v. Gissel Packing Co*., 395 U.S. 575 614 (1969); that a fair and reliable election can be had with the traditional remedies for violations of the Act; that the only alleged unfair labor practice involving the senior management of the Company is Beckham's termination; that the main decisionmaker in Beckham's termination, Schreiber, is no longer with the Company; that therefore the likelihood of further terminations is highly unlikely; that Yates alleged threats of plant closure cannot be the basis for a bargaining order because she only reasonably predicted the financial consequences union representation would have on the Moro facility; and that if the Company is found to have violated the Act, traditional remedies (excluding backpay and reinstatement for Beckham) should be imposed and the bargaining order requested should be denied in its entirety. This is a highly unusual case. The only other employee in the unit allowed himself to be used in Respondent's attempt to rid itself of the Union at the Moro facility. Yates is still with the Company. And while Schreiber is no longer with the Company, two thirds of

[18] Obviously the fact that such a violation had not occurred before would not be a justification for not amending the rule if respondent were so inclined.

[19] The unit is a s follows:

All route sales representatives employed by the Respondent at its Moro, Illinois facility, EXCLUDING office clerical and professional employees, guards and supervisors as defined in the Act.

the group who made the decision to unlawfully terminate Beckham are still with the Company. Stice is not a credible witness so I cannot credit his testimony that he continues to support the Union. As a practical matter if a bargaining order is issued, once the period during which a decertification petition cannot be filed is up, such petition could be filed by Stice alone and the Union would no longer enjoy a majority if the unit still consists of two employees. In the circumstances extant here a bargaining order is the proper remedy. No evidence was offered in this case that the sole purpose of the above-described cards was to bring about an election. The cards were authenticated and received in evidence, I find that the cards unambiguously designated the Union as the employees' collective-bargaining representative. Before Respondent began violating the Act all of the employees in the unit had signed the Union authorization cards. As indicated by Judge Sherman in *Eastern Steel Co.*, supra,

> Under such circumstances, a bargaining order should issue not only in the 'exceptional' case of 'outrageous' and 'pervasive' unfair labor practices, which are of 'such a nature that their coercive effect cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be held.' but also in 'less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process.' *Gissel*, supra, 395 U.S. at 613-614, In view of Respondent's action in destroying the bargaining unit by discriminatorily discharging all but one of the employees in the unit, I conclude that the instant case calls for, at the very least, a 'second category' bargaining order. [footnote omitted] Whether . . . such a 'second category' case . . . calls for a bargaining order turns on whether the possibility of erasing the effects of past unfair labor practices and insuring a fair election by the use of traditional remedies is slight and employee sentiment would on balance, be better protected by a bargaining order. Among the factors material in making such an assessment are the extensiveness of the employer's unfair labor practices in terms of their recurrence in the future. *Gissel*, supra, 395 U.S. at 614-615. [Other citations omitted.] . . . . The discharge of employees because of union activity is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative because no event can have more crippling consequences to the exercise of Section 7 rights than the loss of work.' *Ethan Allen, Inc.*, 247 NLRB 552 (1980); see also *Atlanta Blue Print & Graphics Co.*, 244 NLRB 634 (1979). 'Moreover, in a small unit, the impact of such discharges has a far greater effect than in a larger one and practically makes a fair election impossible.' *Pay 'N Save*, . . . 247 NLRB No. 184 (1980).

Respondent committed "hallmark" violations in that Respondent unlawfully terminated 50 percent of the unit, and it threatened to close the plant and discharge employees if the employees went union. Respondent's director of human resources came from Cedar Rapids to Moro to personally terminate Beckham and he had a Sheriff's deputy frisk Beckham. In view of this and the absence of any real effort to counteract this, I conclude that the mere issuance of a cease-and-desist , reinstatement/backpay, and notice posting order will likely be insufficient to deter Respondent from future unfair labor practices which would impede a fair election. I find that Respondent's conduct is so serious and substantial in character as to warrant the entry of a remedial order requiring Respondent as of January 15, 1999, the approximate date when Respondent began to violate the Act, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge if they selected the Union as their bargaining representative, advising employees that other employees who supported a union in the past were discharged, threatening employees with plant closure if they selected the Union as their bargaining representative, and threatening an employee with discharge if the union organizing efforts were successful.
4. Respondent has violated Section 8(a)(3) and (1) of the Act by discharging Michael Beckham because he formed, joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.
5. The following unit of Respondent's employees is appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All route sales representatives employed by the Respondent at its Moro, Illinois facility, EXCLUDING office clerical and professional employees, guards and supervisors as defined in the Act.

6. The Union has been at all times since January 15, 1999, and still is, the exclusive bargaining representative of the employees in said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
7. Respondent's unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of he Act.
8. Respondent did not otherwise violate the Act in the manner alleged.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully discharged Michael Beckham, it will be recommended that Respondent be ordered to reinstate him to his former position and make him whole for any loss of earnings and benefits he may have suffered as a result of the Respondent's unlawful conduct, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289

(1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The recommended Order will also provide that Respondent bargain in good faith with the Union as the exclusive collective bargaining representative of the above-described unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, National Propane Partners, L.P., Moro, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they selected the Union as their bargaining representative, advising employees that other employees who supported a union in the past were discharged, threatening employees with plant closure if they selected the Union as their bargaining representative, and threatening an employee with discharge if the union organizing efforts were successful.

(b) Discharging its employee Michael Beckham because he formed, joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

(c) In any manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Within 14 days form the date of this Order, offer Michael Beckham full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Michael Beckham whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Michael Beckham in writing that this has been done and that the discharge will not be used against him in any way.

(d) Upon request, recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit, concerning wages, hours, and other terms and conditions of employment and if an understanding is reached, embody the understanding in a signed agreement:

> All route sales representatives employed by the Respondent at its Moro, Illinois facility, EXCLUDING office clerical and professional employees, guards and supervisors as defined in the Act.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Moro, Illinois facility copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized agent, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 15, 1999.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges a violation of the Act not specifically found.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."